Michigan Law Review

Volume 72 | Issue 7

1974

Lawyer's Lawyer: The Life of John W. Davis

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LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS. By *William H. Harbaugh*. New York: Oxford University Press. 1973. Pp. x, 648. $15.

In part because of suspicions aroused by the Watergate affair, lawyers today find themselves increasingly on the defensive in the court of public opinion.[1] This negative public attitude has been fed by a spate of recent books characterizing attorneys as robber barons and influence peddlers.[2] While the unpopularity of the bar has been a recurrent theme in American legal history,[3] the present climate suggests a need for re-examining the attorney's role in twentieth century American society.

An excellent source for such a study is the fine biography of John W. Davis by Professor William H. Harbaugh of the University

1. *See, e.g., America's Lawyers: A Sick Profession?*, U.S. NEWS AND WORLD REPORT, March 25, 1974, at 23; New York Times, May 29, 1974, § 1, at 1, col. 2 (city ed.).

2. *See* M. BLOOM, THE TROUBLE WITH LAWYERS (1968); J. GOULDEN, THE SUPER-LAWYERS (1972); E. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964).

3. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973). Friedman observes that the lawyer "has played a useful role, sometimes admired, but rarely loved." *Id.* at 266.

An early reflection of public hostility toward lawyers is this warning by a resident of post-Revolutionary Charleston against electing attorneys in a municipal canvass: "Shun all lawyers, as they are more liable to corruption than other men; they being used to argue for Wrong, as well as Right, when paid for so doing." Charleston Evening Gazette, Aug. 25, 1786, at 3, col. 1.

of Virginia. The author has produced a readable account that skillfully probes Davis's long career as a talented lawyer. Sensitive to the interplay between the legal profession and the rest of American society, Harbaugh considers the private practice and public service of Davis in a broad context.

Born in West Virginia, Davis received his undergraduate and legal education at Washington and Lee University. He began practicing law with his father in Clarksburg, where he lost his first three trials (one of which involved the theft of twenty-nine chickens and a turkey hen). A decade and a half of small town practice left an imprint on Davis that was never fully erased by his many years on Wall Street. He enjoyed a varied practice, representing individuals and criminal defendants as well as corporations.[4]

After ten years in public life, Davis joined the Wall Street firm of Stetson, Jennings & Russel in 1921, a decision prompted in large measure by a desire to attain financial security and thus indulge a love of comfort and elegance. With clients including the House of Morgan and some of the largest corporations in the nation, Davis came to represent concentrated private economic power. This experience reinforced his ingrained economic conservatism and abhorrence of federal regulatory power.

For several decades before his death in 1955, Davis was widely recognized as the foremost advocate in the United States and the leader of the appellate bar. His success as an advocate was something of an anomaly. While the most famous pre-Civil War lawyers, such as William Wirt and Daniel Webster, regularly argued in court,[5] the best lawyers grew increasingly estranged from the courtroom during the late nineteenth century. The corporation lawyer who rarely left his office emerged at the apex of the profession.[6] Davis never succumbed entirely to this new order: Between 1913 and 1954 he argued 140 cases before the Supreme Court, and appeared regularly before the federal circuit courts and the state appellate bench.

Oliver Wendell Holmes, Jr., William Howard Taft, and Hugo Black rated him one of the most persuasive advocates they had ever heard. Yet, the qualities that marked the Davis style remain elusive. Aside from his careful preparation, Davis's appellate technique is difficult to recapture because so much of his power rested upon personal force. Precise choice of words and a full presentation of the

4. For example, in 1897 Davis defended union members charged with contempt for violating an injunction.

5. M. BAXTER, DANIEL WEBSTER AND THE SUPREME COURT 17-35 (1966).

6. In 1925 Judge Learned Hand lamented that in New York City "the best minds of the profession are scarcely lawyers at all. They may be something much better, or much worse; but they are not that. With courts they have no dealings whatever, and would hardly know what to do if they came there." Lundberg, *The Law Factories: Brains of the Status Quo*, HARPER'S MAGAZINE, July 1939, at 179, 189.

facts were his hallmarks. He eschewed multiple citations, both in argument and in supporting briefs. Following his own advice to "go for the jugular vein," Davis normally argued only the major points of his position, but argued them so strongly that the minor points were swept along unspoken.[7]

Davis always asserted that he kept his practice separate from his personal views, and he resented the suggestion that "a lawyer sells himself body & soul to his clients" (p. 199). In 1924, under pressure from political friends to improve his image for the forthcoming presidential election, Davis penned an eloquent defense of his professional integrity:

> At no time have I confined my services to a single client, and in consequence I have been called upon to serve a great many different kinds of men; some of them good, some of them indifferently good, and others over whose character we will drop the veil of charity . . . . Since the law, however, is a profession and not a trade, I conceive it to be the duty of the lawyer . . . to serve those who call on him unless, indeed, there is some insuperable obstacle in the way.
>
> No one in all this list of clients has ever controlled or even fancied that he could control my personal or my political conscience . . . . The only limitation upon a right-thinking lawyer's independence is the duty which he owes to his clients, once selected, to serve them without the slightest thought of the effect such a service may have upon his personal popularity or this political fortunes. [P. 198-99.][8]

Davis's actions supported this declaration of independence. To the dismay of conservatives, he defended Alger Hiss and Doctor J. Robert Oppenheimer amid the Cold War tensions of the early 1950's. Despite the clamor of liberals, Davis represented South Carolina in arguing for racial segregation in the public schools. He also engaged in *pro bono* work, appearing on behalf of Doctor Clyde Macintosh, a selective conscientious objector, and defending a fellow lawyer, Isador J. Kresel, against criminal charges. To his credit, Davis was supremely indifferent to the tides of public opinion and cared little about the popular standing of his clients.

Nevertheless, Harbaugh rightly contends that the problem of professional independence is more subtle and difficult than Davis recognized. The author argues that "to accept a regular retainer was to change the character of one's practice and to restrict one's political and professional independence" (p. 200), and he relies heavily upon the observations of Felix Frankfurter in contending that

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7. *See* Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940) (Address delivered before the Association of the Bar of the City of New York, October 22, 1940).

8. William M. Kunstler selected a portion of Davis's long letter as the frontispiece for his book, THE CASE FOR COURAGE (1962), a chronicle of ten cases in which attorneys defended unpopular clients.

Davis's associations altered his perceptions of public events. Harbaugh notes that Davis could not criticize his clients' economic and legal activities, even when he privately disapproved of them. What seems particularly bothersome to the biographer was Davis's adherence "to the principle that the lawyer's duty was to represent his client's interest to the limit of the law, not to moralize on the social and economic implications of the client's lawful actions" (p. 264).

Unquestionably, Davis's decision to represent a certain class of clients curtailed his freedom of action. But, as Harbaugh points out, Davis leaned toward economic conservatism long before he came to Wall Street. Furthermore, the intellectual problems posed for lawyers who defend an identifiable interest group or category of client are hardly restricted to the corporate firm. The public interest lawyer,[9] the criminal defense attorney, and counsel for the New Left[10] suffer from similarly contracted legal horizons. Judging from his array of clients and controversial cases, Davis in fact preserved more of his freedom than most lawyers.[11] However, Harbaugh clearly believes that his subject should have demonstrated a more liberal and socially activist stance, and this leads him to erect a somewhat unrealistic standard by which to measure Davis.

Since the colonial period lawyers have played an important role in public affairs. Davis proved no exception, serving as congressman, solicitor general, and ambassador to Great Britain. He received the Democratic nomination for president in 1924, only to be soundly defeated by Calvin Coolidge. Appalled by the anti-Catholic campaign conducted against Alfred E. Smith in 1928, Davis toured the country calling for religious toleration. During his political sallies Davis championed the values of the pre-New Deal Democratic party: states' rights and economy in government.

Yet, Davis did not especially enjoy politics, despite his numerous activities. Very much a private person, he was ever the reluctant candidate, pushed by friends and a sense of duty to accept official position. His love of advocacy and his enjoyment of a large income even caused Davis to reject an appointment to the United States Supreme Court.[12]

9. Ralph Nader's "raiders," for example, have been accused of an anti-business bias. *See* R. BUCKHORN, NADER: THE PEOPLE'S LAWYER 89 (1972). *See generally* C. MCCARRY, CITIZEN NADER (1972).

10. William Kunstler has declared: "I only defend those whose goals I share . . . . I only defend those I love." J. BISHOP, OBITER DICTA 6 (1971).

11. "Although the New Bar is very critical of the Wall Street lawyers' subservient reflection of their clients' political views, the charge is far more applicable to themselves. The Wall Street lawyer, in fact, is likely to shape the policies of his clients, which is certainly not true of counsel to the New Left." *Id.* at 15.

12. Davis in 1922 disclaimed Chief Justice Taft's move to have him named to the high bench. He never regretted the decision.

While in Congress Davis played a key role in the 1912 impeachment of Circuit Judge Robert W. Archbald.[13] After the judge was impeached for using his position to advance his economic interests, Davis was named one of the House managers of the prosecution. He took only a limited part in the prosecution, preparing an analysis of the grounds for judicial impeachment in which he concluded that "high crimes and misdemeanors" encompassed offenses not necessarily indictable as crimes. "No man can justly be considered fit for public office," Davis asserted, "who does not realize the double duty resting upon him—first, to administer his trust with unflinching honesty, &, second . . . to so conduct himself that public confidence in his honesty shall remain unshaken" (p. 85).

As solicitor general, Davis never allowed his personal views to interfere with his advocacy of the government's position. He felt that policy questions were not an appropriate concern of the solicitor general, and thus dutifully defended the Adamson Act,[14] the Child Labor Statute,[15] and other Wilson administration measures that expanded federal power. Although he questioned the wisdom of Negro suffrage, Davis argued against the Oklahoma grandfather clause[16] and the Alabama peonage practice.[17]

Harbaugh wisely does not attempt to describe all of Davis's cases, concentrating instead upon such significant contests as the 1952 steel seizure case,[18] which Harbaugh sees as "the summit" of Davis's career (p. 462). Here Davis's distrust of federal power and his respect for private property flowed together into a powerful attack upon the doctrine of implied executive powers. He regarded Truman's action as "a reassertion of the kingly prerogative, the struggle against which illumines all the pages of Anglo-Saxon history" (p. 462), and was elated at his part in blocking the president.[19] This concern for limited government, together with his acceptance of the white social order, induced Davis to present his last Supreme Court argument on behalf of school segregation. The subsequent *Brown* decision[20] upset Davis, who was confident that history and precedent were overwhelmingly on his side.

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13. For a brief discussion of the Archbald impeachment see R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 57-58 n.15 (1973).

14. Wilson v. New, 243 U.S. 332 (1917).

15. Hammer v. Dagenhart, 247 U.S. 251 (1918).

16. Guinn v. United States, 238 U.S. 347 (1915).

17. United States v. Reynolds, 235 U.S. 133 (1914).

18. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

19. Arthur M. Schlesinger, Jr. has recently argued that, while "the idea of independent presidential power received a severe rebuke" in the steel seizure case, the Supreme Court "by no means excluded presidential initiative in authentic and indisputable crisis." A. SCHLESINGER, THE IMPERIAL PRESIDENCY 143, 148 (1973).

20. Brown v. Board of Education, 347 U.S. 483 (1954).

Harbaugh's book is carefully researched and based in part upon the private papers of his subject. His liberal predilections contrast with Davis's conservatism to produce generally exciting intellectual tension. On some occasions, however, Harbaugh's attitude emerges too sharply. For example, he is clearly impatient with Davis's participation in the Lawyers' Vigilance Committee of the American Liberty League, an anti-New Deal group whose purpose was to issue reports on the constitutionality of New Deal measures. Harbaugh even questions the ethical propriety of attorneys expressing such opinions, yet he never makes clear how the activities of the Lawyers' Committee differed from those of various civil rights organizations. Similarly, in the chapter on the steel seizure, Harbaugh's extended and sympathetic treatment of the grievances of the employees—a matter of marginal relevance to the legal issues raised—grows a bit cloying. Still more troublesome, especially in the Watergate era, is the author's apparent endorsement of the doctrine of inherent executive power, a concept at variance with the very notion of limited government.[21]

Toward the end of his life Davis contended that his achievements were quite small. "I seem," he wrote, "to have caught at the skirt of great events without really influencing them" (p. 523). The author adopts this assessment of Davis's career, and thus one is left to question the contribution of any practicing attorney to American society. If John W. Davis had little impact, how significant can be the activities of most of us? It is a sobering thought.

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21. *Cf.* United States v. Nixon, 42 U.S.L.W. 5237 (U.S. July 24, 1974); United States v. United States Dist. Court, 407 U.S. 297 (1972); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).